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No. 95-1872

In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE WILLIAM STRATE, ASSOCIATE TRIBAL JUDGE OF THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE NORTHERN PLAINS TRIBAL JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

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16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE

This brief is filed pursuant to Rule 37 of the United States Supreme Court Rules. The consent of both the petitioners and respondents to the submission of this brief is attached hereto. The Northern Plains Tribal Judges Association is an organization of the tribal judges in North Dakota, South Dakota, Minnesota and Nebraska representing twenty-five tribal court systems. The Association is incorporated under the laws of the Sisseton-Wahpeton tribal code. The tribal judges of the Association are acutely concerned about the disposition of this case because it will have a dramatic impact upon their ability to dispense justice for both Indians and non-Indians in Indian country should this Court adopt the holding of the Court below. The Association believes the issues raised in this amicus brief are not duplicative of those raised by the parties and that this Court should be aware of the dramatic impact the curtailment of tribal court civil jurisdiction over non-Indians and non-member Indians would have upon both federal and tribal interests achieved by a tribal court's exercise of jurisdiction over causes of action that arise on trust and restricted land within Indian country.

ARGUMENT

I. THE COURT'S DECISION BELOW THAT EVERY EXERCISE OF TRIBAL COURT SUBJECT MATTER JURISDICTION OVER A CAUSE OF ACTION INVOLVING A NON-INDIAN OR A NON-MEMBER INDIAN SHOULD BE SUBJECT TO THE CRITERIA SET OUT IN MONTANA V. UNITED STATES, NOTWITHSTANDING THE CAUSE OF ACTION ARISING ON INDIAN LAND, IS UNPRECEDENTED AND WILL IMPAIR IMPORTANT FEDERAL AND TRIBAL INTERESTS.

The United States Court of Appeals' *en banc* decision in this case, limiting tribal court civil jurisdiction over non-Indians and non-member Indians to cases where a "valid tribal interest" is at stake, *see A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996) (*en banc*), unduly restricts the civil jurisdiction of tribal courts and will impede the progress of tribal courts in delivering justice to all litigants in Indian country. By applying this Court's *Montana* criteria, *see Montana v. United States*, 450 U.S. 544 (1981), to every exercise of subject matter jurisdiction by a tribal court over a non-Indian or a non-member Indian, the Court below has emasculated the ability of tribal courts to provide remedies for both Indians and non-Indians in routine domestic relations cases, tort actions, consumer matters and other disputes that are brought before tribal courts on a daily basis. This unwarranted and unprecedented proscription of tribal court jurisdiction cannot be rejoined by a concomitant expansion of state court jurisdiction over these reservation affairs because of explicit limitations in state constitutions restricting state court jurisdiction over affairs involving Indians that arise within Indian country. The result is that

no forum will be available to many litigants, Indians and non-Indians alike, with legitimate grievances arising in Indian country. This Court should reverse the decision below and restore some sanity to this area of law by reaffirming its decisions in *Montana, supra,* and *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982) recognizing that there has not been an explicit or implicit divesture of tribal authority over any person on trust or allotted land within Indian country.

Indian tribal courts today routinely determine important personal and property rights of a variety of litigants including tribal members, members of other Indian tribes, Indians who are not enrolled with any tribe but are eligible for membership, Canadian Indians, and non-Indians. When exercising this jurisdiction tribal courts must comply with both their own organic documents pertaining to the exercise of jurisdiction (constitutions and codes), as well as federal statutes and court decisions discussing the extent of a tribal court's civil jurisdiction. *See National Farmer's Union Insurance Co. v. Crow Tribe,* 471 U.S. 845 (1985) (extent to which tribal court can exercise civil jurisdiction over non-Indians is a question of federal law). Tribal courts must also remain cognizant of state statutory and case law discussing the extent of tribal court jurisdiction because in many circumstances tribal decisions will need to be enforced through recognition by a state court. *See* SDCL 1-1-25 (requiring state courts in South Dakota to grant comity to tribal court orders in certain circumstances) and North Dakota Supreme Court Rule 7.2 (requiring North Dakota courts to award full faith and credit to tribal court orders provided certain circumstances are met).

Recent developments on both the federal and state levels have brought much visibility to tribal court adjudications and have elevated tribal courts on a par with state and federal courts. For example, the recently enacted Violence Against Women Act requires state and tribal courts to honor each others protection orders in domestic violence cases. See 18 U.S.C. Section 2265. A 1994 amendment to the federal full faith and credit act requires tribal and state recognition and enforcement of each others child support orders. See 28 U.S.C. Section 1738B. Congress now recognizes the viability of a federal crime for a person who crosses reservation boundaries for purposes of violating a tribal court protection order. See 18 U.S.C. Section 2262. Congress has given tribal courts exclusive jurisdiction over the foreclosure of allotted and trust land within reservation boundaries, irrespective of the race or residence of any mortgagee. See 25 U.S.C. Section 483a; *Northwest Production Credit Association v. Smith*, 784 F.2d 323 (8th Cir. 1985). The Indian Child Welfare Act grants tribal courts exclusive subject matter jurisdiction over Indian children domiciled in Indian country, without regard to the race of the parents and guardians of those children. See 25 U.S.C. Section 1911(a). Even the United States can be compelled to litigate an issue of primarily tribal law first in the tribal courts. *See United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996).

These congressional enactments and court decisions, although not explicit grants of jurisdictional authority to Indian tribal courts in some circumstances, are an acknowledgment that tribal courts play an important role

in the resolution of disputes for both Indians and non-Indians that arise in Indian country. The decision below creates a substantial obstacle to a tribal court's effective exercise of civil jurisdiction as it appears to require a Plaintiff in tribal court, in any case in which a non-member of the Indian tribe is an adverse party, to demonstrate that the case either implicates that party's consensual relations with the Tribe or its members or that that party's conduct "threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the Tribe." *Montana*, at 565-566. An impact on a tribal member, as opposed to the Tribe itself, is apparently not enough to satisfy the *Montana* criteria. *See Red Fox v. Hettich*, 494 N.W.2d 638, 645-647 (S.D. 1993) (holding that a tribal court cannot exercise jurisdiction over action brought by tribal member against non-Indian for injuries suffered as result of auto accident because *Montana* rule requires impact on Tribe, not tribal member).

It is important to note that this Court in *Montana*, at 557, explicitly acknowledged the regulatory authority of tribes over activities that non-Indians and non-members engage in on trust or allotted lands within reservation boundaries. Arguendo, therefore, if *Montana* applies to a tribal court's exercise of adjudicatory jurisdiction, as the Court below held, this rule should be similar unless *Montana* cuts a more restrictive swath with regard to adjudicatory jurisdiction, which it clearly does not. If *Montana* is the controlling precedent for the extent of a tribal court's civil jurisdictional authority over

non-Indians or non-members in the tribal forum, its jurisdiction should not be proscribed if the underlying litigation involves activities committed on trust or allotted land within the reservation.

However, the subject matter jurisdiction rule adopted by the *en banc* court below ignores this distinction and creates a monolithic rule governing every attempt by a tribal court to exercise subject matter jurisdiction over any case involving a non-Indian or non-member Indian. Such a rule will likely defeat the exercise of civil jurisdiction in many cases where tribal courts routinely exercise jurisdiction today and will leave many litigants, Indian and non-Indian alike, without a forum to litigate a dispute.

For example, under the rule adopted by the court below a tribal court could not enjoin a non-member from illegally hunting on trust or allotted land, unless the second criteria of *Montana* is met, an unlikely scenario. *See South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994) (on remand from this Court, court affirms decision of district court that hunting and fishing by non-Indians on lands in fee status because of previous taking to construct dam on Missouri River did not impact tribe substantially enough to justify regulation under *Montana*). Not only is such a conclusion absurd in light of this Court's recognition in *Montana* that a Tribe can regulate such activity, but it seems to be inconsistent with both 18 U.S.C. Section 1165, declaring it a trespass for a non-Indian to hunt or fish on Indian land without tribal permission, and the federal court decisions directing that tribal courts adjudicate disputes involving trespass to Indian land. *See United States v. Plainbull, supra; United States v. Tsosie, supra.*

Similar inequities would result in other areas of tribal court adjudications. A tribal court could not evict a non-Indian or non-member from an Indian housing project on trust land as part of a domestic abuse order unless the *Montana* criteria was shown. A tribal court could not punish a non-Indian with civil contempt for violating the terms of a tribal court protection order unless the abused party could demonstrate that the exercise of tribal court jurisdiction is necessary to protect tribal self-government. A tribal court could not order the garnishment of the wages of a non-member child support obligor employed by a tribal casino located on trust land, even pursuant to a valid state court child support order required to be recognized under 28 U.S.C. 1738B. A tribal court could not exercise jurisdiction over a tort action brought by a non-Indian against a non-member Indian in tribal court even if it arises on trust land on the reservation. A tribal court could not terminate the parental rights of a non-Indian or non-member parent even if the child involved is a tribal member residing within Indian country, in apparent contradiction to the federal Indian Child Welfare Act, *see* 25 U.S.C. Section 1911(a). Lastly, a tribal court could not proceed with a paternity establishment against a non-Indian or non-member even though the child resides on trust land on the reservation and the child was conceived there, again in apparent contradiction to federal policy. *See Howe v. Ellenbecker*, 774 F.Supp. 1224 (D.S.D. 1992), *aff'd*, 8 F.3d 1258 (8th Cir. 1993) (federal policy underlying Title IV-D of the Social Security Act contemplates that child support actions involving reservation-domiciled Indian children be brought in the tribal courts).

What makes the lower court's unwarranted extension of *Montana* even more alarming to the tribal judges is that the state courts will not be available in many of these instances to fill the jurisdictional void left by the decision below because of constraints in their own state constitutions. The North Dakota Constitution, for example, has a provision which disclaims jurisdiction over all Indians in Indian country, *see* N.D. Const. Art. XIII, Section 1, clause 2, unless jurisdiction is lawfully acquired pursuant to federal law. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986). The Supreme Court there has declared that under this constitutional provision it has no jurisdiction over a tort action brought by a non-Indian against a non-member Indian because the relevant inquiry under North Dakota law is the Defendant's status as an Indian, not his status as a tribal member. *See Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975). In a similar vein the North Dakota Supreme Court has declared that the state courts have no subject matter jurisdiction over paternity and child support actions where the Indian child was conceived on the reservation, apparently without regard to the race of the putative father. *See In Interest of M.L.M.*, 529 N.W.2d 184 (N.D. 1995); *McKenzie County Social Services Board v. V.G.*, 392 N.W.2d 399 (N.D. 1986), *cert. denied*, 480 U.S. 930 (1987). Under the decision below it is doubtful that the tribal court would have subject matter jurisdiction over a non-Indian or non-member father whose only contact with the reservation was to have sexual relations and father a child there. Such an inequitable result will impact every litigant in Indian country, not just the Indian tribe and its members, because every tribal court represented

by the Northern Plains Tribal Judges' Association sees a parade of non-Indians and non-member Indians come before its court system on a regular basis, sometimes seeking relief and other times defending cases.

The decision below, because it fails to apply this Court's clear admonition in *Montana* that a tribe's regulatory authority is proscribed only in cases when a tribe is attempting to regulate the use of a non-Indian's fee land, creates a rule which would invite jurisdictional chaos into Indian country and defeat important tribal and federal interests. This Court should reaffirm the continued viability of the clear rule in *Montana* that tribes, and consequently their courts, have authority over activities that non-Indians and non-member Indians engage in on Indian trust and allotted lands.

II. THE LOWER COURT'S OPINION, INSOFAR AS IT EQUATES NON-INDIANS WITH NON-MEMBER INDIANS, IS UNNECESSARY DICTA WHICH THIS COURT SHOULD DISABUSE.

Throughout the lower court's opinion the terms non-Indian and non-member are used almost interchangeably. For example, the Court below announces the tribal court subject matter jurisdiction rule of an Indian tribal court as follows: "a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember . . . " *At* 939. This rule is announced despite the fact that this case does not involve the question of a tribal court's jurisdiction over non-member Indians from other Tribes. It does not appear from the briefs to the lower court that either of the parties

addressed the extent to which tribal courts may exercise civil jurisdiction over non-member Indians.

This is an issue of critical importance to the *amicus* because of the substantial number of non-member Indians who live and work on other reservations and have intermarried into other Tribes. For example, the Sioux reservations of South Dakota came into existence after the Great Sioux Nation was divided by allotment in 1889. *See United States v. Sioux Nation*, 448 U.S. 371 (1980). This was somewhat of an artificial division, however, because the separate bands that constituted the "Great Sioux Nation" were interrelated and continue to be so to this day. There are a substantial number of Sioux Indians who are enrolled with one tribe but live and work on the reservation of another Tribe. Similarly, among the bands of Indians that constitute the Minnesota Chippewa Tribe, each band may have their own court system and band laws, but they each belong to the Minnesota Chippewa Tribe. If the lower court decision has curtailed civil jurisdiction over non-Band members it has achieved a massive interference with the ability of the separate Bands of the Minnesot Chippewa Tribe to dispense justice on their own reservations even for persons who are constituent members of a larger Tribe.

The litigation in this case deals solely with the question of whether a tribal court can exercise subject matter jurisdiction over a civil action involving non-Indians arising on trust land within the reservation boundaries. The lower court apparently raised the issue of the extent of tribal court jurisdiction over non-member Indians on its own initiative even though resolution of that issue was not necessary to the disposition of the pending case. In a

similar circumstance, involving the authority of a tribe to regulate hunting and fishing by non-Indians, the United States Court of Appeals for the Eighth Circuit admonished a district court for ruling on the extent of a Tribe's regulatory authority over non-member Indian hunting and fishing when that issue was not before the Court. *See South Dakota v. Bourland*, 508 U.S. 679, 686 n.6 (1993). That Court has failed to heed its own admonishment in this case and has consequently created much consternation for tribal courts in the Eighth Circuit because of difficulty in interpreting the meaning of the decision below.

This Court, irrespective of whether it affirms or reverses the decision below, should disavow the language below which implies that the extent of a tribal court's civil jurisdiction over a non-Indian is the same in all extents as its jurisdiction over non-member Indians. Such language is unnecessary dicta and should be repudiated. *See e.g., Hodel v. Irving*, 481 U.S. 704, 710 n.1 (1987) (lower court erred in ruling on constitutionality of amended escheat provisions of Indian Land Consolidation Act when no land in pending case escheated under amended provisions).

CONCLUSION

For the reasons stated herein, amicus urges this Court to reverse the decision of the Court below and to rule that the tribal court had jurisdiction over the subject matter between the parties. The amicus also urges this Court to disaffirm the language in the lower court's opinion equating the subject matter jurisdiction of a tribal

court over a dispute involving a non-Indian Defendant with that of a dispute involving a non-member Indian.

Respectfully submitted this 8th day of November, 1996.

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